

Before the
COPYRIGHT ROYALTY BOARD
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Washington, D.C.

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Copyright Royalty Board

In the Matter of

Digital Performance Right in Sound
Recordings and Ephemeral Recordings

Docket No. 2005-1 CRB DTRA

REPLY FINDINGS
BY COLLEGIATE BROADCASTERS, INC.

Pursuant to the Amendment to Amended Trial Order dated November 28, 2006,
Collegiate Broadcasters, Inc. hereby respectfully submits its Reply Findings of Fact.

Responses to SoundExchange's Proposed Findings of Fact¹

8. *All of the economic experts agreed that one valid approach to setting a hypothetical market rate is to select an appropriate benchmark from an actual functioning market. Jaffe WDT at 10; Pelcovits WDT at 2-3, 9-11; Brynjolfsson WRT at 4. The issue then becomes which benchmark most reliably reflects a rate that would be reached by a willing buyer and a willing seller in the hypothetical statutory market.*

9. *Dr. Pelcovits offers a benchmark based on real marketplace transactions for blanket licenses for the same sound recording copyright, between many of the same real buyers and real sellers that participate in the webcasting market, as he seeks to replicate what would occur in the hypothetical market that would exist in the absence of compulsory license. Section V(B). Dr. Jaffe, in contrast, does not seek to replicate what would happen in the free market in the absence of a compulsory license. Indeed, he concedes that, if there was no statutory license, the rates that would be negotiated would be higher than what he proposes. Section V(C). Rather, he asks the Court to ignore real markets, real buyers, and real sellers, because of defects he finds in those markets, and in those sellers. He relies instead on rates from an entirely different market, for an entirely different copyright, because they are subject to an antitrust decree that imposes standards that Dr. Jaffe would like to see the Court impose here.*

RESPONSE: The purpose of a benchmark analysis is not to determine which *single* benchmark applies, but which appropriate benchmark applies to which service. SoundExchange has devoted considerable time and effort to arguing that the musical

¹ The numbered and italicized paragraphs refer to SoundExchange's Proposed Findings of Fact.

works benchmark is not appropriate based on the arguments made by Professor Jaffe on behalf of DiMA but does not address the Noncommercial Educational Stations' basis for using or not using this benchmark to set the rates applicable to them. In doing so, SoundExchange is ignoring the fact that the section 114 statutory license requires the Copyright Royalty Judges to set separate royalty rates for different types of services. See 17 U.S.C. § 114(f)(2)(B).

22. *In contrast, as a complement to Dr. Pelcovits's benchmark analysis, Dr. Brynjolfsson testified that a standard alternative approach to setting a price that would be paid in this hypothetical market would be to "model" the economics of the situation -- examining costs and revenues -- to estimate the "surplus" produced by webcasting before sound recording royalties are paid. After calculating the surplus, Dr. Brynjolfsson then examined the relative bargaining power of the parties in order to estimate how they would divide up that surplus, thereby determining the expected royalty that would result from a willing buyer/willing seller transaction with the webcasters. Brynjolfsson WDT at 9-34, 42-53.*

23. *Dr. Brynjolfsson conducted an extensive analysis to calculate the estimated "surplus." Prior to the initiation of discovery, he used public sources to estimate current and future costs of conducting a webcasting business as well as the revenues that a well-run webcaster can earn. Brynjolfsson WDT at 9-34. His testimony was based on a large number of sources, including what webcasters themselves claimed publicly. Id. After discovery, he produced an amended direct statement based on actual data supplied by the webcasters, reporting that these data largely confirmed his original conclusions. Brynjolfsson AWDT at 10-18.*

24. *Based on his analyses, Dr. Brynjolfsson testified that the webcasting industry had reached the break-even point for ad-supported services and was poised to make considerable profits in the next five years. Brynjolfsson WDT at 44. He added that webcasters already are making considerable profits with their subscription offerings. Brynjolfsson Amended WDT at 7-8. He proposed calculation of a set of royalty rates based on his opinion that record companies would get 75% of the surplus in a hypothetical free market negotiation with a webcaster. Brynjolfsson WDT at 8. That division reflects the fact that the major record companies, by virtue of their copyrights and their large catalogs, have substantial bargaining power vis-à-vis webcasters who own no such unique assets and whose industry is characterized instead by low barriers to entry. Dr. Brynjolfsson's analysis is also consistent with the amount of surplus sound recording copyright owners capture in other markets where sound recordings are offered to the public. Brynjolfsson WDT at 8. As Dr. Brynjolfsson explained, this advantage in bargaining power does not reflect monopoly power. In the hypothetical market, there would remain a substantial amount of competition among copyright owners, notwithstanding that each has a unique and valuable good to offer to webcasters. Brynjolfsson WRT at 39.*

25. Dr. Brynjolfsson's analysis is highly credible because he used data from a wide variety of sources and his approach is a sensible one. It is telling that the webcasters never attempted to offer expert testimony to support their claim that they cannot function profitably with the current royalty rates. As discussed in more detail in SoundExchange Proposed Findings of Fact below, the occasional and incomplete economic evidence that webcasters did adduce raised more questions than it answered. Section VII. The fair and reasonable conclusion to be drawn from the absence of such evidence is that there exists no economic analysis that could support their claim.

26. Dr. Jaffe criticized both Dr. Brynjolfsson and Dr. Pelcovits, arguing that their analyses were infected by excess market power on the part of the record companies. Jaffe WRT at 1-16, 25-29. In Jaffe's view, the CRJs should hypothesize a market in which no record company has a catalog of recordings, but instead individual copyright holders each are separately negotiating with the webcasters. In essence, he asks the Court to create a market of sellers who do not exist in the real world offering a product different than which is offered in the real world (and different from the blanket license that is at issue in this proceeding), to account for concerns about nearly "perfect competition" that are manifested nowhere in the DMCA or the willing buyer/willing seller standard. His proposal is also startlingly one-sided -- it corrects for alleged market power exercised by the record companies, but makes no effort to correct for market power exercised by webcasters such as Yahoo! Dr. Jaffe's proposal has no basis in the statute or in the precedent supplied by the Librarian's ruling in the CARP webcasting proceeding. See SoundExchange's Conclusions of Law.

RESPONSE: The above entirely ignores the economics of Noncommercial Educational Stations and the evidence provided by said stations in the course of these proceedings. In fact, one of the economic expert witnesses on whose testimony SoundExchange relies heavily, Professor Brynjolfsson, recognized that he did not conduct a separate economic analysis for Noncommercial Educational Stations, based on the assumption that, noncommercial webcasters and simulcasters as a whole are subject to the same economics as commercial webcasters and simulcasters, have "similar products that they're selling and similar revenue sources and similar costs." Brynjolfsson Rebuttal Testimony at 283-284. As a result, SoundExchange's Proposed Findings of Fact entirely ignore the significant differences between Noncommercial Educational Stations and not only commercial stations but other noncommercial stations as well, including but not limited to their ineligibility for CPB funding, their often diminutive budgets, their almost insignificant internet audiences, and their inability to sell advertising because of federal bans and university regulations.

27. Dr. Brynjolfsson offers a third approach to calculating an appropriate royalty rate, based on how much better the economics of webcasting are than they were in 2001 when the existing rates were set. WDT at 36-41. Other evidence also supports the notion that the economics of webcasting have improved dramatically during this period. Mr. Griffin reported on how the move toward portability and ubiquitous wireless broadband connections are changing those economics dramatically. Griffin WDT at 59. Dr. Brynjolfsson, in the rebuttal phase, examined the accelerating entry into the market of

simulcasters, as well as the substantial profits being earned by those webcasters. Brynjolfsson WRT at 18-36.

28. All of this evidence indicates that webcasters will be making windfall profits in the next five years if rates are not substantially raised. The witnesses called by the webcasters in an attempt to rebut this evidence either did not know the relevant information and thus were not credible. Given the dramatic changes in advertising revenues over the past five years, as well as reductions in the cost of bandwidth, rates set in 2001 necessarily require substantial upward adjustment for the period 2006-2010. Section VII.

RESPONSE: Again, the above entirely ignores the economics of Noncommercial Educational Stations and the evidence provided by said stations in the course of these proceedings. CBI once again notes that the economic expert witness on whose testimony SoundExchange relies heavily, Professor Brynjolfsson, recognized that he did not conduct a separate economic analysis for Noncommercial Educational Stations, based on the assumption that, noncommercial webcasters and simulcasters as a whole are subject to the same economics as commercial webcasters and simulcasters, have "similar products that they're selling and similar revenue sources and similar costs." Brynjolfsson Rebuttal Testimony at 283-284. As a result, SoundExchange's Proposed Findings of Fact entirely ignore the significant differences between Noncommercial Educational Stations and not only commercial stations but other noncommercial stations as well, including but not limited to their ineligibility for CPB funding, their often diminutive budgets, their almost insignificant internet audiences, and their inability to sell advertising because of federal bans and university regulations.

29. In addition to the analyses of Dr. Pelcovits and Dr. Brynjolfsson, SoundExchange has presented a host of evidence about the marketplace that is strongly corroborative of both experts' analyses.

30. Foremost, that evidence includes real marketplace agreements between record companies and digital music services for a host of different types of services. These agreements reflect the rates and terms that willing buyers and willing sellers agree to in the marketplace for blanket licenses for sound recordings (similar to this proceeding). As shown in the testimony of record company witnesses, in virtually every context, sound recording copyright owners and digital music services agree in the free market to compensate sound recording copyright owners under a "greater of" rate structure that includes a substantial percentage of revenue, as well as per performance and per subscriber minima. These agreements also reflect, for example, the value that digital music services and record companies place on "interactivity" -- the adjustment made by Dr. Pelcovits -- because record companies and digital music services negotiate in the free market for the rights to both on-demand and pre-programmed video services. Section V.C.

31. Other evidence, presented primarily in the expert testimony of Dr. Brynjolfsson and Mr. Griffin, demonstrates convincingly the rapid growth in audience,

revenues, and market entry of webcasters. This evidence -- which the webcasters provided virtually no evidence to rebut -- demonstrates that webcasting is an expanding and increasingly lucrative market that companies large and small, simulcaster and Internet-only, commercial and non-commercial are aggressively pursuing. This evidence compels an increase in the royalty rates, as well as establishment of a mechanism (such as the "greater of" rate structure) to ensure that copyright owners and performers are fairly compensated for the entirety of the license period by all webcasters regardless of business model. Section VI-VII.

RESPONSE: Again, the foregoing entirely ignores the economics of Noncommercial Educational Stations and the evidence provided by said stations in the course of these proceedings. SoundExchange's Proposed Findings of Fact entirely ignore the significant differences between Noncommercial Educational Stations and not only commercial stations but other noncommercial stations as well, including but not limited to their ineligibility for CPB funding, their often diminutive budgets, their almost insignificant internet audiences, and their inability to sell advertising because of federal bans and university regulations.

33. *The record evidence fails to support the proposition that webcasting causes a substantial and broad promotional effect on CD and download sales. Section IX.*

34. *The webcasters' argument fails for several independent reasons.*

35. *First, webcasters have provided absolutely no empirical or other data on which the Court could evaluate the claimed "promotional" effect. What evidence there is -- data on buy buttons from various websites -- does not establish that a webcasting prompted the purchase of a CD or digital download. Even if it did, at most this evidence demonstrates only that very few people purchase music through buy buttons as compared with the number of people listening to webcasting. Pelcovits WRT at 18-20. For example, Mr. Eisenberg from Sony BMG noted that Yahoo! -- the largest webcaster -- sells very few downloads of music, and most of those it does sell are actually sold to users of its on-demand subscription service. Eisenberg WRT at 14-18.*

36. *Second, all of webcasters' anecdotal evidence from personnel involved in negotiating with record companies about promotional campaigns was focused on promotional campaigns involving activities other than just playing music (such as music videos, featuring artists on portals' music pages, often along with special content like interviews, concerts and the like). Frank WDT at ¶ 14; Frank Dir. Test. at 61, 98; Isquith WDT at ¶ 9, Isquith Dir. Test. at 40-51. Webcasters could not separate out any claimed effect from mere webcasting spins alone (which are the plays subject to the statutory license).*

37. *Third, the evidence shows that record companies promote only a handful of recordings at any one time. Brynjolfsson WRT at 37-38. A blanket discount applied to a label's entire catalog based on promotion of a few selected releases would be unfair to many copyright owners and performers whose works are played but not promoted.*

Moreover, as Dr. Brynjolfsson explained, the promotion effect (if any) is likely to be very heterogeneous -- it is impossible to derive a one-size-fits-all "promotion" discount. It therefore makes little sense to adjust the royalty rates for all songs in a record company's catalog that a webcaster chooses to play because the vast majority of them are not the subject of a promotional effort at the time they are played. Rather, the parties are free to make whatever direct deals may make sense for plays of songs that are in fact being promoted. Brynjolfsson WRT at 37-38. The record evidence demonstrates that such agreements do occur where in the mutual interest of copyright owners, performers, and webcasters.

38. In any event, promotion cannot be assessed without simultaneous consideration of a possible substitution effect. Pelcovits WDT at 46-51; Brynjolfsson WRT at 37. The evidence shows that webcasters offer a vast array of niche stations that are likely to substitute for music purchases for some listeners. Thus, any general promotional effect from webcasting is at least canceled out by the substitution effect, so no adjustment is warranted. Moreover, the evidence also shows that willing sellers (the record companies) take account of the likelihood of substitution in negotiating agreements in the free market for blanket licenses, but do not consider possible promotion of individual tracks, which is irrelevant to the price of blanket licenses for a wide range of sound recordings.

RESPONSE: CBI did introduce evidence concerning the promotional effect of webcasting. However, once again, SoundExchange offered no evidence to contradict this evidence.

39. Noncommercial webcasters argue that they should receive a lower royalty rate primarily because they are "different," both because they perform a public service, and because they do not earn revenues in the same way that commercial webcasters do. Neither argument justifies a different rate under the willing buyer/willing seller standard.

RESPONSE: This ignores the precedent for a differential rate established by the Webcaster I proceedings. Moreover, it improperly lumps Noncommercial Educational Stations with other noncommercial stations. As a Copyright Arbitration Royalty Panel has previously recognized in a proceeding under § 118, it is appropriate that lower rates should be set for Noncommercial Educational Stations than for other noncommercial webcasters. Report of the Copyright Royalty Arbitration Panel, Docket No. 96-6 CARP-NCBRA (July 22, 1998). Likewise, the Regulations promulgated by the Copyright Office, in 37 CFR 253.5, apply a separate, lower rate specifically to Noncommercial Educational Stations (described in the regulation as "noncommercial radio stations which are licensed to colleges, universities, or other nonprofit educational institutions and which are not affiliated with National Public Radio").

40. As an initial matter, the public service aspects of college or public broadcasters' operations provide no basis for a lower royalty under the willing buyer/willing seller standard. Where Congress wanted to require a separate subsidized rate for noncommercial stations, it has done so; notably, it did not do so in Sections 112

and 114. The noncommercial broadcasters have provided no evidence to suggest that, with respect to all of the other expenditures that they make for their operations, they receive a discount because of their mission. There is no basis for creating such a discount here. To the extent that NPR, college, or religious broadcasters wish to pursue their public service mission, there is no basis on which to compel copyright owners and performers to subsidize it. Section XI.

RESPONSE: The language of §§ 112 and 114 of the Copyright Act is permissive and leaves it to the discretion of the Copyright Royalty Board to choose to apply a differential rate. Congress established the statute in a manner that would not draw traditional lines between different types of services because of the fact that the legislation was reactive and could not predict how the technology would be implemented, monetized or otherwise used by both commercial and various non-commercial entities. When the previous determination of the royalties for licenses under §§ 112 and 114 occurred, Noncommercial Educational Stations were not represented. The present proceedings are the first opportunity for a rate setting court to consider evidence submitted by Noncommercial Educational Stations as to why a rate lower than that applicable to other noncommercial stations should apply to them, as is the case under §118. SoundExchange has chosen to ignore that evidence and consistently lumps Noncommercial Educational Stations and other noncommercial stations together.

41. With respect to differences in revenues, noncommercial webcasters have shown that they have different revenue sources (such as funding from universities, donations, and government, as well as sponsorships which are increasingly like commercial advertising), but have not shown how those differences justify a different market value for sound recordings. Indeed, just as in the Webcaster I CARP, noncommercial webcasters have provided little if any economic data that could justify a different rate. NPR, for example, could not identify how many of its stations are streaming, how large their streaming audience is, how much revenue they earn from streaming, or any other relevant facts. Thus -- other than blanket assertion that they should be treated differently -- the record is bereft of evidence to support a lower rate for noncommercial webcasters. Section XI.

RESPONSE: SoundExchange again lumps Noncommercial Educational Stations and other noncommercial stations together, and fails to address any of the evidence submitted by the Noncommercial Educational Stations on this point.

42. In any event, whatever differences might exist are swamped by one, single and controlling similarity -- commercial and noncommercial webcasters are competing with each other for the same audience (and often the same revenues, whether in the form of sponsorships or advertising). Dr. Brynjolfsson provided convincing testimony that the record companies, in a free market, would not offer lower rates to smaller or non-commercial webcasters because of concerns about loss of revenue as a result of cannibalization of the more profitable commercial providers. Brynjolfsson WRT at 40.

RESPONSE: SoundExchange again lumps Noncommercial Educational Stations and other noncommercial stations together, and fails to address any of the evidence submitted by the Noncommercial Educational Stations. Noncommercial Educational Stations have submitted significant evidence that their limited financial resources and minuscule internet listenerships limit their ability to compete with commercial webcasters and that, because of their educational and non-profit status, competing for revenue and an increased audience is not their goal. SoundExchange has failed to address this evidence.

43. This threat of cannibalization is even more real given the record evidence showing that the distinction between commercial and non-commercial stations should not be over-emphasized, as many non-commercial stations have come to resemble commercial stations. They employ ad agencies, chase sponsorship revenue, generate considerable amounts of revenue, and have large audiences. Brynjolfsson WRT at 40-41. As shown by NPR's Blueprint for Growth, NPR and its NPR Stations view themselves as competing directly with commercial entities and are developing a music portal precisely to compete with commercial entities for more money. SX Ex. 233 RP (NPR Blueprint for Growth).

RESPONSE: This proposed finding is based on testimony and evidence that concerns NPR stations exclusively and gives no consideration to the entirely different position of Noncommercial Educational Stations. See Brynjolfsson Written Rebuttal Testimony at 40-41. See also SX Ex. 233 RP.

44. In sum, the record evidence demonstrates that there is no credible basis on which to discount the royalty rates for small or noncommercial stations. They compete for the same audience as commercial webcasters and should pay for the same fair market value for sound recordings.

RESPONSE: The Section 114 statutory license at issue in this proceeding specifically mandates that the rates and terms set by the Copyright Royalty Judges “shall distinguish among the different types of eligible nonsubscription transmission services then in operation, and shall include a minimum fee for each such type of service.” 17 U.S.C. § 114(f)(2)(B) (emphasis added). This is not a permissive request, but an affirmative obligation. The statute does not require the Judges to determine whether or not there are different types of services; clearly, in Congress’s view, there are. Rather, the Judges must examine each of the different types of services and prescribe a royalty rate that reflects the competitive market rate for each type. Noncommercial licensees are fundamentally different than commercial licensees. See Joint Noncommercial Proposed Findings of Fact and Conclusions of Law, Proposed Findings of Fact Nos. 6-34. Their motivations are different, their restrictions are different, their format is different, and their sources of funding are different. These differences would all come into play in the hypothetical marketplace the Copyright Royalty Judges (“Judges”) are asked to consider. The differences between noncommercial and commercial licensees mandate that a separate rate be set for noncommercial licensees. Moreover, unlike National Public Radio (“NPR”) stations, CBI Member Stations are not “public broadcasting entities” (as

defined in 17 U.S.C. 118(g)) qualified to receive funding from the Corporation for Public Broadcasting pursuant to the criteria set forth in 47 U.S.C. § 396. Robedee WDT, footnote 5 at p.4. As has been recognized in regulations promulgated by the Copyright Office pursuant to a royalty rate-setting arbitration under § 118 of the Copyright Act, these differences justify setting an even lower rate for Noncommercial Educational Stations than the rates set for other noncommercial entities (which, themselves, historically have been set substantially lower than rates for commercial services). 37 C.F.R. § 253.5.

85. The webcasting market is growing rapidly. Since 2004, the total number of webcasters paying royalties to SoundExchange has grown from 430 to 788, an increase of 83%. Kessler WRT at 2. From 2004 to 2005, the royalties paid increased by more than 40%. Kessler WRT at 2.

RESPONSE: SoundExchange argues that the “webcasting market has been growing rapidly,” but notably fails to demonstrate any such growth in webcasting by non-commercial services, generally, or by Noncommercial Educational Stations, specifically.

86. There has been growth in all categories of webcasting. Kessler WRT at 2; SX Ex. 22 RR. The number of nonsubscription webcasters paying SoundExchange has grown from 114 in 2004 to 400, as of September 8, 2006. Kessler WRT at 2; SX Ex. 022 RR. Much of this growth has been in the number of simulcasters paying SoundExchange, which grew from 81 in 2004 to 294 in 2006. Kessler WRT at 2. Notably, this understates the growth in the number of simulcasters, as some major broadcast conglomerates pay once for all of their stations and thus are counted as a single webcaster. Kessler WRT at 2-3. Clear Channel has increased the number of its stations that are streaming from 52 in January 2003 to 583 today. Parsons Dir. Test. at 14, 65-67.

RESPONSE: SoundExchange argues that there has been growth in “all categories of webcasting,” but notably fails to demonstrate any such growth in webcasting by non-commercial services, generally, or by Noncommercial Educational Stations, specifically.

87. The number of Internet-only webcasters has also grown, with one company catapulting into the top five services in terms of royalties paid even though it was making no transmissions under the statutory license approximately one year ago. Kessler WRT at 2; SX Ex. 022 RR. At the same time, the number of subscription services has nearly doubled since 2004 and total receipts from subscription services now exceed more than 20% of the royalties paid to SoundExchange. Kessler WRT at 3.

RESPONSE: SoundExchange argues that there has been growth in internet-only webcasters, but notably fails to demonstrate any such growth in webcasting by non-commercial services, generally, or by Noncommercial Educational Stations, specifically.

211. A profit-maximizing seller will typically price sound recordings based on the economics of efficient (and thus more profitable) buyers. Brynjolfsson WRT at 36. It does not make sense to set a market rate based on smaller webcasters, noncommercial webcasters, or other webcasters not attempting to maximize their webcasting revenues,

because those buyers are not primarily driven by market concerns. Brynjolfsson WDT at 6.

RESPONSE: The section 114 statutory license requires the Copyright Royalty Judges to set separate royalty rates for different types of services. *See* 17 U.S.C. § 114(f)(2)(B). That Congress granted the § 114 statutory license to be available to webcasters of all types and sizes indicates, first, that Congress believed that there are, in fact, “different types” of services; second, that Congress did not intend to exclude small Noncommercial Educational Stations from the statutory license; and third, and most importantly, that Congress intended that rates for these services be set at rates that these services could afford. As further evidence of this intent with respect to Noncommercial Educational Stations in particular, Congress in 2002 passed the Small Webcasters Settlement Act (“SWSA”) in response to the outcry from smaller noncommercial webcasters who could not afford to pay the rates set by the previous webcasting CARP. Small Webcaster Settlement Act of 2002, Pub. L. 107-321, 116 Stat. 2780 (2002). As recognized previously by a Copyright Arbitration Royalty Panel in a proceeding under § 118, it is appropriate that lower rates should be set for Noncommercial Educational Stations than for other noncommercial webcasters. Report of the Copyright Royalty Arbitration Panel, Docket No. 96-6 CARP-NCBRA (July 22, 1998). Regulations promulgated by the Copyright Office, in 37 CFR 253.5, apply a separate, lower rate specifically to Noncommercial Educational Stations (described in the regulation as “noncommercial radio stations which are licensed to colleges, universities, or other nonprofit educational institutions and which are not affiliated with National Public Radio”). Furthermore, these regulations impose minimal reporting requirements upon such Noncommercial Educational Stations. The impact of the rate on Noncommercial Educational Stations also must be evaluated in tandem with other costs imposed under the statutory license, and in particular the cost of recordkeeping. In keeping with Congressional intent, the combined cost of both the royalty and the recordkeeping obligations imposed on the Noncommercial Educational Stations should be set at a reasonable level that these services can readily afford. The combined costs should not prevent these Noncommercial Educational Stations from fulfilling their mission. Such a result would defeat the purpose of the statutory license. Any “willing buyer/willing seller” analysis of an appropriate rate likewise would take into account the not-for-profit status of these stations, their educational purpose, limited audience, limited budgetary resources, limited opportunities to generate revenue, limited broadcast days, limited uses of music, and the costs of compliance with the license requirements.

212. The CARP rejected agreements between the record companies and smaller webcasters because it found that the larger webcasters, which had more bargaining power, were more relevant to establishing a market rate. Brynjolfsson WDT at 6.

RESPONSE: The CARP itself stated, “Applying the same commercial broadcaster rate to noncommercial entities affronts common sense.” Report of the Copyright Arbitration Royalty Panel, Docket No. 2000-9, CARP DTRA 1& 2, at 89 (Feb. 20, 2002). The commercial CARP rates, the Yahoo!-RIAA agreement on which they were based, and the 2003 agreement to continue the rates through 2005 all are very explicitly a commercial rate that is wholly inapplicable to Noncommercial Broadcasters. Moreover, as

recognized previously by a Copyright Arbitration Royalty Panel in a proceeding under § 118, it is appropriate that lower rates should be set for Noncommercial Educational Stations than for other noncommercial webcasters. Report of the Copyright Royalty Arbitration Panel, Docket No. 96-6 CARP-NCBRA (July 22, 1998). Regulations promulgated by the Copyright Office, in 37 CFR 253.5, apply a separate, lower rate specifically to Noncommercial Educational Stations (described in the regulation as "noncommercial radio stations which are licensed to colleges, universities, or other nonprofit educational institutions and which are not affiliated with National Public Radio"). Furthermore, these regulations impose minimal reporting requirements upon such Noncommercial Educational Stations. The impact of the rate on Noncommercial Educational Stations also must be evaluated in tandem with other costs imposed under the statutory license, and in particular the cost of recordkeeping. In keeping with Congressional intent, the combined cost of both the royalty and the recordkeeping obligations imposed on the Noncommercial Educational Stations should be set at a reasonable level that these services can readily afford. The combined costs should not prevent these Noncommercial Educational Stations from fulfilling their mission. Such a result would defeat the purpose of the statutory license. Any "willing buyer/willing seller" analysis of an appropriate rate likewise would take into account the not-for-profit status of these stations, their educational purpose, limited audience, limited budgetary resources, limited opportunities to generate revenue, limited broadcast days, limited uses of music, and the costs of compliance with the license requirements.

216. Dr. Pelcovits looked at the market closest to non-interactive webcasting — a market which had the identical sellers, many of the same buyers, the same product to be licensed (a blanket license in sound recordings), for a service delivered to the consumer in the same way (music performed over a personal computer). That market — for interactive webcasting — provided a close benchmark from which one could make relatively simple adjustments to determine a rate for non-interactive webcasting. Pelcovits WDT at 12-15.

RESPONSE: Not one of the agreements relied upon by Dr. Pelcovits in the creation of his benchmark involved a single noncommercial entity. See Servs. Ex. 63 (list of the 17 agreements on which Dr. Pelcovits relied; see 5/16/Tr. 128:7-11 (Pelcovits)). Therefore, because of the differences between noncommercial and commercial entities, his model is particularly inapposite to Noncommercial Broadcasters. Dr. Pelcovits himself admitted as much. See Pelcovits WDT at 5-6; 5/16/06 Tr. 221:6-223:5 (Pelcovits) (stating that his model assumes a profit-driven commercial webcaster and does not set a separate rate for Noncommercial Broadcasters). Further, CBI testified that for Noncommercial Educational Stations, a "flat fee appears to be the only appropriate means of charging stations for the use of sound and ephemeral recordings." Robedee WDT ¶ 92.

219. For the reasons discussed below, Dr. Pelcovits' benchmark analysis is fully consistent with the willing buyer/willing seller standard and is an appropriate approach to determinate the rates that would be negotiated in the absence of a statutory license. Dr. Jaffe's benchmark approach is invalid for all of the reasons discussed by the Webcaster I CARP, as well as the reasons discussed below.

RESPONSE: Not one of the agreements relied upon by Dr. Pelcovits in the creation of his benchmark involved a single noncommercial entity. See Servs. Ex. 63 (list of the 17 agreements on which Dr. Pelcovits relied; see 5/16/Tr. 128:7-11 (Pelcovits)). Therefore, because of the differences between noncommercial and commercial entities, his model is particularly inapposite to Noncommercial Broadcasters. Dr. Pelcovits himself admitted as much. See Pelcovits WDT at 5-6; 5/16/06 Tr. 221:6-223:5 (Pelcovits) (stating that his model assumes a profit-driven commercial webcaster and does not set a separate rate for Noncommercial Broadcasters). Further, CBI testified that for Noncommercial Educational Stations, a “flat fee appears to be the only appropriate means of charging stations for the use of sound and ephemeral recordings.” Robedee WDT ¶ 92.

236. Almost all of the contracts for the benchmark market for interactive music services examined by Dr. Pelcovits contained a three-part rate structure, in which the buyer paid the greater of a per-play rate, a percentage of revenue rate, or a per-subscriber rate. Pelcovits Dir. Test. I at 27; Pelcovits WDT at 22-23.

RESPONSE: Not one of the agreements relied upon by Dr. Pelcovits in the creation of his benchmark involved a single noncommercial entity. See Servs. Ex. 63 (list of the 17 agreements on which Dr. Pelcovits relied; see 5/16/Tr. 128:7-11 (Pelcovits)). Therefore, because of the differences between noncommercial and commercial entities, his model is particularly inapposite to Noncommercial Broadcasters. Dr. Pelcovits himself admitted as much. See Pelcovits WDT at 5-6; 5/16/06 Tr. 221:6-223:5 (Pelcovits) (stating that his model assumes a profit-driven commercial webcaster and does not set a separate rate for Noncommercial Broadcasters). Further, CBI testified that for Noncommercial Educational Stations, a “flat fee appears to be the only appropriate means of charging stations for the use of sound and ephemeral recordings.” Robedee WDT ¶ 92.

246. Adjusting for interactivity by looking at how consumers value interactivity makes sense because the webcasters’ demand for sound recordings from record companies is derived from the consumers’ demand to hear sound recordings played by webcasters. This concept, called derived demand, is commonly used in economics. Pelcovits Dir. Test. I at 43-44.

331. Given that the issue raised by Dr. Jaffe is relevant only to the per play rate component of Dr. Pelcovits’s rate proposal, the fact that SoundExchange revised its rate proposal during the rebuttal phase of the case to phase in increases in the per play rate renders the matter moot. The revised proposal maintains a per play rate close to the rate that has been in effect during the first year of the current license term, and increases over time to the per play rate originally proposed by SoundExchange. This allows the per play rate to increase as the advertising market matures. Pelcovits WRT at 15-16; Eisenberg WRT at 18-21.

RESPONSE: This argument by SoundExchange assumes that the service are monetizing their streams. Notably, however, SoundExchange failed to offer evidence that such monetization is either widespread or growing among Noncommercial Education Stations; indeed, it is rare. More generally, CBI testified that for Noncommercial

Educational Stations, a “flat fee appears to be the only appropriate means of charging stations for the use of sound and ephemeral recordings.” Robedee WDT ¶ 92.

595. All evidence indicates that the webcasting audience has grown tremendously since the CARP set its rate and that it will continue to grow at a significant rate through the statutory period. Dr. Brynjolfsson projected that listenership to webcasters would grow at the rate of 25% per year. Brynjolfsson WDT at 13. That projection is certainly reasonable and, if anything, likely to be low.

RESPONSE: SoundExchange argues that the “webcasting audience has grown tremendously,” but notably fails to demonstrate any such growth in audience for webcasting by noncommercial services, generally, or by Noncommercial Educational Stations, specifically. Moreover, Dr. Brynjolfsson’s model is, on its face, inapplicable to noncommercial services anyway, as it, like the model offered by Dr. Pelcovits, is based entirely upon an assumption of a profit-driven commercial webcaster as buyer. Dr. Brynjolfsson said he “focused on webcasters of significant size that are actively seeking to maximize the long-term value of their enterprises.” Brynjolfsson WDT at 6.

601. The webcasting advertising market experienced a decline in 2001 and 2002, but since 2003, the market has rebounded. Brynjolfsson WDT at 18. Webcasters have been charging more for their ads and have sold a higher percentage of their inventory. Brynjolfsson WDT at 18.

RESPONSE: SoundExchange’s arguments regarding advertising are inapplicable to noncommercial services, generally, and Noncommercial Educational Stations, specifically. Moreover, Dr. Brynjolfsson’s model is, on its face, inapplicable to noncommercial services anyway, as it, like the model offered by Dr. Pelcovits, is based entirely upon an assumption of a profit-driven commercial webcaster as buyer. Dr. Brynjolfsson said he “focused on webcasters of significant size that are actively seeking to maximize the long-term value of their enterprises.” Brynjolfsson WDT at 6.

650. Dr. Brynjolfsson testified that he was confident that the rate set by the CARP was not too high because there has been continued investment in the market by webcasters since that time. Brynjolfsson Dir. Test. I at 33-34. As is discussed below, see supra Section VII.A & B, there has been considerable entry in the webcasting market in recent years. See, e.g., SX Ex. 22 RR; Brynjolfsson WRT at 18-25; compare, e.g., RBX 4 with SX Ex. 235 RP; compare also Porter Dir. Test. at 51 with Lam Reb. Test at 76.

RESPONSE: SoundExchange argues that investment in webcasting and entry into the “webcasting market” has been growing,” but notably fails to demonstrate any such growth in for webcasting investment or entry by noncommercial services, generally, or by Noncommercial Educational Stations, specifically. Moreover, Dr. Brynjolfsson’s model is, on its face, inapplicable to noncommercial services anyway, as it, like the model offered by Dr. Pelcovits, is based entirely upon an assumption of a profit-driven commercial webcaster as buyer. Dr. Brynjolfsson said he “focused on webcasters of significant size that are actively seeking to maximize the long-term value of their enterprises.” Brynjolfsson WDT at 6.

676. *Webcasters commonly sell in-stream ads, banner ads on both the players and their webpages, video pre-roll ads, audio pre-roll ads, click-throughs, and sponsorships. Griffin WDT at 47-49; Porter Dir. Test. at 22; Serv. Trial Ex. 168; Brynjolfsson AWDT at 13; Porter Dir. Test. at 41; Brynjolfsson WDT at 23-28; Hanson Dir. Test. at 19-21. Non-commercial stations sell sponsorships, seeking revenue from the same advertisers as commercial stations. Griffin WDT at 47-49; Griffin WRT at 10.*

RESPONSE: CBI testified that Noncommercial Educational Stations “are primarily operated for the educational benefit of its members. They are not in there to generate money to put in anybody's pockets. It doesn't have shareholders or anything else like that.” 8/2/06Tr. 168:21-169:3 (Robedee). The average budget of a noncommercial educational station is only \$9,000 and FCC-licensed Noncommercial Educational Stations are prohibited, with few exceptions, from airing advertisements. Robedee WDT ¶¶ 42, 46, 59 and Robedee Tr. at 136. While these stations are allowed to solicit underwriting, most do not enjoy success due to their small signals and small, sometimes un-measurable audiences. *Id.* Most unlicensed Noncommercial Educational Stations also struggle to obtain ongoing advertising or underwriting of any consequence due to their limited signal and audience. CBI Member Stations' Internet simulcasts operate with fewer, and even more limited, resources. The stations' limited budgets and limited means of adding to the operating budgets, along with their inability to carry funds forward from one year to the next, prohibits many of these stations from making non-essential capital acquisitions, such as automation systems that are the norm for commercial webcasters. Robedee WDT ¶ 47.

777. *None of the above analysis of webcaster revenues includes the substantial additional value that they receive from other, direct and indirect, benefits derived from webcasting.*

RESPONSE: This argument by SoundExchange assumes that the service are monetizing their streams. Notably, however, SoundExchange failed to offer evidence that such monetization is either widespread or growing among Noncommercial Education Stations; indeed, it is rare.

885. *But wireless webcasting is not simply coming in the next five years — it is already here. Commercial webcasters, noncommercial webcasters, and small webcasters are all investing in mobile technologies and encouraging consumers to listen to streams over wireless devices. Griffin WRT at 25.*

RESPONSE: Notably, SoundExchange failed to offer evidence that such investment in wireless/mobile webcasting is either widespread or growing among Noncommercial Education Stations

891. *That is why they — Internet-only, simulcasters, and non-commercial stations — are all investing heavily in mobile webcasting. Griffin WRT at 19-20. Yahoo! is explicitly strategizing [REDACTED]. SX 30 DR. In a September 2005 presentation, Mr. Roback made numerous comments to this effect: [REDACTED] SX 30 DR.*

RESPONSE: Notably, SoundExchange failed to offer evidence that such investment in wireless/mobile webcasting is either widespread or growing among Noncommercial Education Stations

1086. SoundExchange has proposed that all webcasters — Internet-only and simulcasters; large and small; commercial and noncommercial — should pay the same royalties. The evidence in this proceeding supports no distinction between different types of webcasters that is consistent with the willing buyer/willing seller standard. See SoundExchange Revised Rate Proposal.

RESPONSE: The Section 114 statutory license at issue in this proceeding specifically mandates that the rates and terms set by the Copyright Royalty Judges “shall distinguish among the different types of eligible nonsubscription transmission services then in operation, and shall include a minimum fee for each such type of service.” 17 U.S.C. § 114(f)(2)(B) (emphasis added). This is not a permissive request, but an affirmative obligation. The statute does not require the Judges to determine whether or not there are different types of services; clearly, in Congress’s view, there are. Rather, the Judges must examine each of the different types of services and prescribe a royalty rate that reflects the competitive market rate for each type. Noncommercial licensees are fundamentally different than commercial licensees. *See* Joint Noncommercial Proposed Findings of Fact and Conclusions of Law, Proposed Findings of Fact Nos. 6-34. Their motivations are different, their restrictions are different, their format is different, and their sources of funding are different. These differences would all come into play in the hypothetical marketplace the Copyright Royalty Judges (“Judges”) are asked to consider. The differences between noncommercial and commercial licensees mandate that a separate rate be set for noncommercial licensees. Moreover, unlike National Public Radio (“NPR”) stations, CBI Member Stations are not “public broadcasting entities” (as defined in 17 U.S.C. 118(g)) qualified to receive funding from the Corporation for Public Broadcasting pursuant to the criteria set forth in 47 U.S.C. § 396. Robedee WDT, footnote 5 at p.4. As has been recognized in regulations promulgated by the Copyright Office pursuant to a royalty rate-setting arbitration under § 118 of the Copyright Act, these differences justify setting an even lower rate for Noncommercial Educational Stations than the rates set for other noncommercial entities (which, themselves, historically have been set substantially lower than rates for commercial services). 37 C.F.R. § 253.5.

1087. As set forth below, willing sellers would not offer a separate rate to simulcasters or noncommercial stations as a matter of economics because those stations compete directly with Internet-only and commercial stations for audience. To the extent that noncommercial stations paying a lower rate take audience from commercial stations paying a higher rate (i.e., “cannibalize” the audience), copyright owners and performers would be harmed. In the absence of a compulsory license, record companies and performers would not agree to such an across-the-board discount. See Section XI(C).

RESPONSE: The Section 114 statutory license at issue in this proceeding specifically mandates that the rates and terms set by the Copyright Royalty Judges “shall distinguish among the different types of eligible nonsubscription transmission services then in

operation, and shall include a minimum fee for each such type of service.” 17 U.S.C. § 114(f)(2)(B) (emphasis added). This is not a permissive request, but an affirmative obligation. The statute does not require the Judges to determine whether or not there are different types of services; clearly, in Congress’s view, there are. Rather, the Judges must examine each of the different types of services and prescribe a royalty rate that reflects the competitive market rate for each type. Noncommercial licensees are fundamentally different than commercial licensees. *See* Joint Noncommercial Proposed Findings of Fact and Conclusions of Law, Proposed Findings of Fact Nos. 6-34. Their motivations are different, their restrictions are different, their format is different, and their sources of funding are different. These differences would all come into play in the hypothetical marketplace the Copyright Royalty Judges (“Judges”) are asked to consider. The differences between noncommercial and commercial licensees mandate that a separate rate be set for noncommercial licensees. Moreover, unlike National Public Radio (“NPR”) stations, CBI Member Stations are not “public broadcasting entities” (as defined in 17 U.S.C. 118(g)) qualified to receive funding from the Corporation for Public Broadcasting pursuant to the criteria set forth in 47 U.S.C. § 396. Robedee WDT, footnote 5 at p.4. As has been recognized in regulations promulgated by the Copyright Office pursuant to a royalty rate-setting arbitration under § 118 of the Copyright Act, these differences justify setting an even lower rate for Noncommercial Educational Stations than the rates set for other noncommercial entities (which, themselves, historically have been set substantially lower than rates for commercial services). 37 C.F.R. § 253.5.

1088. In practical reality, webcasters of all kinds are converging, seeking the same audience, selling to the same advertisers, and using the same strategies in the market. Commercial and noncommercial stations compete with each other, and there are many large noncommercial stations that behave very much like commercial stations, with aggressive plans for growth and significant revenues. See Section XI(D)-(E).

RESPONSE: The Section 114 statutory license at issue in this proceeding specifically mandates that the rates and terms set by the Copyright Royalty Judges “shall distinguish among the different types of eligible nonsubscription transmission services then in operation, and shall include a minimum fee for each such type of service.” 17 U.S.C. § 114(f)(2)(B) (emphasis added). This is not a permissive request, but an affirmative obligation. The statute does not require the Judges to determine whether or not there are different types of services; clearly, in Congress’s view, there are. Rather, the Judges must examine each of the different types of services and prescribe a royalty rate that reflects the competitive market rate for each type. Noncommercial licensees are fundamentally different than commercial licensees. *See* Joint Noncommercial Proposed Findings of Fact and Conclusions of Law, Proposed Findings of Fact Nos. 6-34. Their motivations are different, their restrictions are different, their format is different, and their sources of funding are different. These differences would all come into play in the hypothetical marketplace the Copyright Royalty Judges (“Judges”) are asked to consider. The differences between noncommercial and commercial licensees mandate that a separate rate be set for noncommercial licensees. Moreover, unlike National Public Radio (“NPR”) stations, CBI Member Stations are not “public broadcasting entities” (as defined in 17 U.S.C. 118(g)) qualified to receive funding from the Corporation for Public

Broadcasting pursuant to the criteria set forth in 47 U.S.C. § 396. Robedee WDT, footnote 5 at p.4. As has been recognized in regulations promulgated by the Copyright Office pursuant to a royalty rate-setting arbitration under § 118 of the Copyright Act, these differences justify setting an even lower rate for Noncommercial Educational Stations than the rates set for other noncommercial entities (which, themselves, historically have been set substantially lower than rates for commercial services). 37 C.F.R. § 253.5.

1090. To the extent that the Judges desire to consider a discounted rate for noncommercial stations for reasons other than the willing buyer/willing seller standard, they should ensure that any discounted rate minimize the threat of cannibalization. Imposing a cap on listenership at a modest level (no more than 20 simultaneous listeners) would decrease, though not eliminate, the risk of harm to sound recording copyright owners from such a discount. See Section XI(C).

RESPONSE: Dr. Brynjolfsson presented testimony that a separate rate for noncommercial broadcasters would lead to cannibalization, but this testimony is nothing but another example of his baseless opinions. Dr. Brynjolfsson did not do any quantitative study of his cannibalization theory. 11/21/06 Tr. 257: 5-14 (Brynjolfsson). So when he suggests that the risk of cannibalization is very real and enormous, he has no way to support those claims.

In fact, the evidence suggests otherwise. Noncommercial Broadcasters have been paying under separate rates since the last CARP and neither Dr. Brynjolfsson (nor any of SoundExchange's witnesses) have proffered any explanation for why there has been no evidence of cannibalization in the marketplace as a result of Noncommercial Broadcasters paying these separate, lower rates. The reality of the marketplace is that Noncommercial Broadcasters offer different programming and do not compete with commercial services.

Dr. Brynjolfsson's cannibalization theory relies on the premise that commercial services and Noncommercial Broadcasters offer "identical products" in the marketplace. 11/21/06 Tr. 106:13-17 (Brynjolfsson). However, he has offered no evidence that the Noncommercial Broadcasters are indeed offering an "identical product." In fact, the evidence, as presented above, is quite to the contrary.

Indeed, Dr. Brynjolfsson cannot proffer any testimony that noncommercial broadcasters are offering the identical product, because Dr. Brynjolfsson knows almost nothing about noncommercial broadcasters. Other than a few NPR stations cited in his testimony, he did not look at any data concerning any other noncommercial licensees. 11/21/06 Tr. 256:8-13 (Brynjolfsson). More importantly, he even admitted that the few NPR stations cited in his testimony are not meant to be representative of noncommercial stations. 11/21/06 Tr. 256:14-21.

1091. Nothing in the DMCA requires the Judges to set a separate rate for simulcasters or noncommercial webcasters. The DMCA does not create a separate

category for such webcasters. Nor does it exempt simulcast or noncommercial stations from the willing buyer/willing seller standard.

RESPONSE: The Section 114 statutory license at issue in this proceeding specifically mandates that the rates and terms set by the Copyright Royalty Judges “shall distinguish among the different types of eligible nonsubscription transmission services then in operation, and shall include a minimum fee for each such type of service.” 17 U.S.C. § 114(f)(2)(B) (emphasis added). This is not a permissive request, but an affirmative obligation. The statute does not require the Judges to determine whether or not there are different types of services; clearly, in Congress’s view, there are. Rather, the Judges must examine each of the different types of services and prescribe a royalty rate that reflects the competitive market rate for each type. Noncommercial licensees are fundamentally different than commercial licensees. *See* Joint Noncommercial Proposed Findings of Fact and Conclusions of Law, Proposed Findings of Fact Nos. 6-34. Their motivations are different, their restrictions are different, their format is different, and their sources of funding are different. These differences would all come into play in the hypothetical marketplace the Copyright Royalty Judges (“Judges”) are asked to consider. The differences between noncommercial and commercial licensees mandate that a separate rate be set for noncommercial licensees. Moreover, unlike National Public Radio (“NPR”) stations, CBI Member Stations are not “public broadcasting entities” (as defined in 17 U.S.C. 118(g)) qualified to receive funding from the Corporation for Public Broadcasting pursuant to the criteria set forth in 47 U.S.C. § 396. Robedee WDT, footnote 5 at p.4. As has been recognized in regulations promulgated by the Copyright Office pursuant to a royalty rate-setting arbitration under § 118 of the Copyright Act, these differences justify setting an even lower rate for Noncommercial Educational Stations than the rates set for other noncommercial entities (which, themselves, historically have been set substantially lower than rates for commercial services). 37 C.F.R. § 253.5.

1100. Dr. Pelcovits agreed with Dr. Brynjolfsson’s approach, finding that a seller might be willing to offer different rates to different buyers if market segmentation of consumers was possible, but would not do so for different webcasters selling to the same group of consumers. Pelcovits Dir. Test. II at 222-23.

RESPONSE: The primary motivation for a noncommercial licensee must be its non-profit mission, and that will undoubtedly result in different business decisions than would be made by a profit-motivated buyer. Because Noncommercial Broadcasters are terrestrial radio stations, streaming is at most an ancillary activity to them. Johnson WDT ¶¶ 13-18; Stern WDT at 10-11; Robedee WDT ¶ 28; Willer ¶ 21; 6/27/06 Tr. 73:4-20 (Stern); 8/1/06 Tr. 17:1-15 (Johnson). They will not be willing buyers of the digital public performance right if the fee is set too high. They will simply return to being over-the-air broadcasters. *See* Coryell WDT ¶ 46; Parsons WDT ¶¶ 1(B), 52.

It is clear that any application of a commercial fee model to noncommercial licensees would not make sense. Willer WDT ¶ 91. For example, the interactive service agreements reviewed by Dr. Pelcovits to arrive at his benchmark proposal, *see* Pelcovits WDT at 22, are wholly inapplicable to noncommercial licensees because they were

entered into by buyers with completely different business models, sources of funding, and motivations. Equating a business decision by Napster to a business decision by a small student-run college radio station is laughable.

The only way to set an appropriate rate for noncommercial licensees is to look to evidence specific to noncommercial licensees. Willer WDT ¶ 91. SoundExchange completely ignored the participation of noncommercial licensees in the direct phase of this proceeding, and on rebuttal only presented a small amount of evidence regarding five noncommercial radio stations that is inapplicable to the hundreds of noncommercial licensees in general. Therefore, the Judges must look solely to the evidence presented by the noncommercial participants in this proceeding.

It is beyond dispute that services such as Noncommercial Broadcasters that use less music should pay less in sound recording performance royalties. As even SoundExchange's own economist, Dr. Brynjolfsson, affirmed, "a company who uses more music should pay more all else equal," and "a company that uses less music should [pay] less, all else equal." 11/21/06 Tr. 251:19-252:4 (Brynjolfsson). Even music formatted radio stations play less music than Internet-only webcasters. They should pay less. Similarly, Russell Hauth, the Executive Director of the NRBMLC, stated that mixed format stations "should not be required to pay the same fee as a music formatted station." 7/27/06 Tr. 287:9-17 (Hauth).

Given that fewer songs, on average, are played on Noncommercial Broadcasters' stations than on Internet-only webcasting, Noncommercial Broadcasters should be subject to a lower sound recording performance royalty. Moreover, as has been recognized in regulations promulgated by the Copyright Office pursuant to a royalty rate-setting arbitration under § 118 of the Copyright Act, differences between even noncommercial stations justify setting an even lower rate for Noncommercial Educational Stations than the rates set for other noncommercial entities (which, themselves, historically have been set substantially lower than rates for commercial services). 37 C.F.R. § 253.5.

1101. Dr. Jaffe also agreed that in deciding whether different rates would be set for different webcasters, an important factor to consider is the degree to which the different webcasters compete for the same audience. Jaffe Reb. Test. at 195-96, 201. The concept applies to non-commercial as well as commercial webcasters. Jaffe Reb. Test. at 274.

RESPONSE: It is clear that any application of a commercial fee model to noncommercial licensees would not make sense. Willer WDT ¶ 91. For example, the interactive service agreements reviewed by Dr. Pelcovits to arrive at his benchmark proposal, *see* Pelcovits WDT at 22, are wholly inapplicable to noncommercial licensees because they were entered into by buyers with completely different business models, sources of funding, and motivations. Equating a business decision by Napster to a business decision by a small student-run college radio station is laughable.

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1104. The evidence presented by SoundExchange establishes that all types of webcasters — Internet-only services, simulcasters, small commercial services, noncommercial services, and educational stations — compete against each other in the marketplace: "It is impossible to segregate Internet-only webcasters from simulcasters and non-commercial stations from commercial stations. They are all competing for the same listeners in the same ways and raising money in essentially the same fashion. They all recognize that the future (and the present) is in offering many channels of music programming that users can access over the Internet and over wireless networks. And they are all aggressively investing in that future, recognizing that there are enormous sums of money to be made." Griffin WRT at 17-18.

RESPONSE: It is clear that any application of a commercial fee model to noncommercial licensees would not make sense. Willer WDT ¶ 91. For example, the interactive service agreements reviewed by Dr. Pelcovits to arrive at his benchmark proposal, *see* Pelcovits WDT at 22, are wholly inapplicable to noncommercial licensees because they were entered into by buyers with completely different business models, sources of funding, and motivations. Equating a business decision by Napster to a business decision by a small student-run college radio station is laughable.

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1115. At the most basic level, noncommercial webcasters are selling the same thing as AOL, Yahoo!, and Clear Channel — access to an audience that sponsors want to buy their products. Griffin WRT at 12.

RESPONSE: It is clear that any application of a commercial fee model to noncommercial licensees would not make sense. Willer WDT ¶ 91. For example, the interactive service agreements reviewed by Dr. Pelcovits to arrive at his benchmark proposal, *see* Pelcovits WDT at 22, are wholly inapplicable to noncommercial licensees because they were entered into by buyers with completely different business models, sources of funding, and motivations. Equating a business decision by Napster to a business decision by a small student-run college radio station is laughable.

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1119. SoundExchange submitted expert testimony from Dr. Erik Brynjolfsson, Dr. Michael Pelcovits, and James Griffin showing that noncommercial stations increasingly resemble commercial stations in all aspects relevant to this proceeding and to the willing buyer/willing seller standard and therefore are not entitled to a separate rate. E.g., Brynjolfsson Reb. Test. at 107-08.

RESPONSE: The primary motivation for a noncommercial licensee must be its non-profit mission, and that will undoubtedly result in different business decisions than would be made by a profit-motivated buyer. Because Noncommercial Broadcasters are terrestrial radio stations, streaming is at most an ancillary activity to them. Johnson WDT ¶¶ 13-18; Stern WDT at 10-11; Robedee WDT ¶ 28; Willer ¶ 21; 6/27/06 Tr. 73:4-20 (Stern); 8/1/06 Tr. 17:1-15 (Johnson). They will not be willing buyers of the digital public performance right if the fee is set too high. They will simply return to being over-the-air broadcasters. *See* Coryell WDT ¶ 46; Parsons WDT ¶¶ 1(B), 52.

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1184. In many respects, college stations are in a substantially similar situation to other kinds of noncommercial stations. As set forth below, the evidence established that some collegiate broadcasters have large audiences, stream significant amounts of music, sell underwriting and sponsorships, carry side channels, and have enormous resources, just like commercial and NPR stations. Brynjolfsson Reb. Test. at 281-82. Some collegiate broadcasters even sell actual advertising on their streams. Brynjolfsson Reb. Test. at 282. A willing seller would not license music to those stations at a reduced rate, because that would have the effect of cannibalizing revenue from commercial use of the license.

RESPONSE: Noncommercial Educational Stations' webcasts, which are the subject of this proceeding, have significantly smaller audiences than their over-the-air broadcasts. CBI Member Stations' webcasts generally have small listenerships, typically averaging fewer than 10 listeners at any given time, that pale by comparison to commercial webcasting entities. Robedee Tr. at 137, 175; Robedee WDT ¶ 24; Willer Tr. at 293; Brynjolfsson WRT at 42.

Most Noncommercial Educational Stations do not have significant financial resources. The average budget of a noncommercial educational station is \$9,000. Robedee WDT ¶ 42 and Robedee Tr. at 136. This is a far stretch from the hundreds of thousands of dollars of revenue alluded to by Prof. Brynjolfsson in his testimony. Brynjolfsson WRT at 41.

FCC-Licensed Noncommercial Educational Stations are, with few exceptions, prohibited from airing advertisements. Robedee WDT ¶ 46, 59. They are allowed to solicit underwriting. *Id.* Some stations enjoy success with their underwriting endeavors, but most do not due to their small signals and small, sometimes un-measurable audiences. *Id.* Most unlicensed Noncommercial Educational Stations also struggle to obtain ongoing advertising or underwriting of any consequence due to their limited signal and audience.

In addition, Professor Brynjolfsson could only provide two examples of educational stations that have large audiences, stream significant amounts of music, sell underwriting and sponsorships, carry side channels, and have enormous resources. Brynjolfsson Reb. Test at 282. One is WHRB, the Harvard University station. WHRB is not the typical educational station because it operates in the commercial portion of the band, in a large market at a well known and prestigious university and is allowed to carry advertising. The other is WBUR, which is also unlike other Noncommercial Educational Stations because it is an NPR station, funded by the CPB.

1185. There is no basis under the statute for carving out a unique discount for educational stations. Through their streaming services, educational stations are now offering music that users can listen to over the Internet anywhere in the world. Willer Dir. Test. at 327, 330-31 (KXUL's Internet outreach makes the radio station's

programming available to a worldwide audience); Papish at 94 (Harvard's webcasting programming is aimed at "a world wide audience").

RESPONSE: SoundExchange confuses the availability of these webcasts with their actual use. CBI Member Stations' webcasts generally have small listenerships, typically averaging fewer than 10 listeners at any given time, that pale by comparison to commercial webcasting entities. Robedee Tr. at 137, 175; Robedee WDT ¶ 24; Willer Tr. at 293; Brynjolfsson WRT at 42. This includes international listeners, if any.

1186. Some college stations position their services to compete with commercial stations. The evidence in the record shows that some of IBS's member stations use the Live365 service to stream their simulcasts — thus, their services are in side-by-side competition with thousands of other non-collegiate stations, including numerous commercial stations, available on Live365. Kass Dir. Test. at 46-47.

RESPONSE: There is no evidence that the stations in question were motivated by a desire to compete when they decided to use when they decided to use Live365 as its streaming provider. Moreover, of the thousands of stations that stream via Live365, only a handful are Noncommercial Educational Stations.

1187. In some cases the competition between college and commercial stations is explicit; one educational station has trademarked a phrase describing their programming because "in radio, the way one markets its brand or its programming tends to be very competitive." Papish Dir. Test. at 89-90.

RESPONSE: The fact that one out of the thousands of Noncommercial Educational Stations in the United States has trademarked a phrase describing their programming has no evidentiary value.

1188. The record evidence does not establish that educational institutions as a general matter are unable to pay a market rate for the royalties. To the contrary, some college radio stations have large budgets, and some college radio stations have ample revenue to pay a market rate for the sound recording royalty. For example:

- *One station reported an annual operating budget of \$550,500; another reported an annual operating budget of \$200,000; another reported an annual budget of \$75,000. Robedee Dir. Test. at 194-95.*

- *Mr. Kass testified that educational budgets might range from \$250 per year to \$100,000 per year, and estimated the average operational budget of IBS member stations at \$9,000 per year. Kass WDT at ¶ 9; Kass Dir. Test. at 22.*

- *Mr. Papish testified that WHRB's budget is \$130,000 per year. Papish Dir. Test. at 113. WHRB also has a savings account it can draw upon in the case of financial necessity. Papish Dir. Test. at 152.*

RESPONSE: These examples are in no way representative of the financial position of the vast majority of Noncommercial Educational Stations. One again, the average budget

of a noncommercial educational station is \$9,000. Robedee WDT ¶ 42 and Robedee Tr. at 136.

1189. Larger stations obtain revenue and financial resources from advertising or underwriting, sponsorships, donor acknowledgement, and various financial forms of support from their educational institutions. Brynjolfsson Reb. Test. at 272-75, 282; Stern Dir. Test. at 242; SX Ex. 202 RP (WAMU Financials, at 3). For example, Mr. Papish testified that WHRB sells advertisements, as well as accepts donations. Papish Dir. Test. at 114-15. WHRB also raised \$100,000 during its last capital campaign. Papish Dir. Test. at 153.

RESPONSE: That Congress granted the § 114 statutory license to be available to webcasters of all types and sizes indicates that Congress did not intend to exclude small Noncommercial Educational Stations from the statutory license and that Congress intended that rates for these services be set at rates that these services could afford. The fact that some of the larger, high-profile educational stations are able to secure underwriting, sponsorships, donor acknowledgement, and financial support from their educational institutions should not detract from the fact that most Noncommercial Educational Stations cannot because:

- The average budget of a noncommercial educational station is \$9,000. Robedee WDT ¶ 42 and Robedee Tr. at 136.
- FCC-Licensed Noncommercial Educational Stations are, with few exceptions, prohibited from airing advertisements. Robedee WDT ¶ 46, 59.
- Although they are allowed to solicit underwriting, most are not successful in attracting such underwriting due to their small signals and small, sometimes unmeasurable audiences. *Id.*
- Most unlicensed Noncommercial Educational Stations also struggle to obtain ongoing advertising or underwriting of any consequence due to their limited signal and audience.

1190. Educational stations also typically receive funds through student activity fees and budgets afforded to academic departments. Robedee WDT at ¶ 42.

RESPONSE: These are meager resources, which explains why the The average budget of a noncommercial educational station is \$9,000. Robedee WDT ¶ 42 and Robedee Tr. at 136.

1191. The ability of college stations to pay the statutory webcasting rates was crystallized by the testimony of WHRB's Mr. Papish. He testified that in 2005 WHRB paid only slightly more for all of its licensing fees (including SoundExchange, ASCAP, BMI and SESAC), than it did for food. As Mr. Papish was quick to point out, the food costs included alcohol. Papish Dir. Test. at 154-55; SX Trial Ex. 135. Thus, WHRB paid more for its food and alcohol in 2005 than it did for the use of the 70,000 - 90,000 unique sound recordings it streamed during the year. Papish Dir. Test. at 156.

RESPONSE: As mentioned above, WHRB is not the typical educational station because it operates in the commercial portion of the band, in a large market at a well known and prestigious university and is allowed to carry advertising.

1192. In addition, educational stations' operational budgets do not always reflect the stations' full array of financial resources. The official budget figures for educational stations can be arbitrary. For example, Mr. Robedee discussed the small budget of his radio station KTRU, but his own salary as General Manager is not included in that budget. Robedee Dir. Test. at 196. Some of KTRU's computing hardware was acquired for free from the university. Robedee Dir. Test. at 196. The student operation of the station itself is paid for out of student fees. Robedee Dir. Test. at 199. Mr. Robedee testified that many other educational stations receive computing services from universities without those costs being reflected by the educational station's budget.

RESPONSE: None of these "financial resources" amount to cash available for the station to spend. In order to pay substantially increased rates, the Noncommercial Educational Stations would have to have access to a significantly increased cash flow. As previously mentioned, most of them have very limited budgets. Moreover, the example of an employee's salary is misleading because approximately 80 percent of CBI member stations do not have an employee associated with the station, except for an advisor role, and these individuals do not get compensated for that advisor role in many instances. Robedee Tr. at 201.

1193. Even stations were [sic] fewer resources would be able to pay under SoundExchange's proposed rate. SoundExchange's proposed rate for 2006 is \$0.0008 per performance. CBI's Mr. Willer testified that KXUL had an average of 2.94 simultaneous listeners in 2004, or 25,754 aggregate tuning hours for the entire year. Willer Dir. Test. at 290. Assuming that KXUL had 12 performances of sound recordings for every one of those hours, SoundExchange's proposed per play rate for 2006 would result in royalties of \$247.24 owed by KXUL. Ultimately, under SoundExchange's proposed minimum fee, KXUL would pay \$500 for the year.

RESPONSE: It follows that in 2006, the \$500 minimum fee owed by KXUL would represent more than 100% the amount it would owe if the per listener/per play rate of \$.0008 was applied strictly. Moreover, this calculation is based on average listenership which overstates the number of listeners actually listening to music because (a) many listeners stay connected even when they are not actually listening to the stream (See Willer Tr. at 292); and (b) the average listenership figures include non-music programming, including athletic events which garner by far the largest audiences (See Robedee Tr. at 138; see also Robedee WDT ¶¶ 24-25) and the performance of which is not compensable under the statutory license. Robedee Tr. at 151-152. This "overpaying" would be exacerbated by the annual rate increases proposed by SoundExchange, totaling 137% in the next 4 years

1194. Similarly, IBS's Mr. Kass testified that the typical web audience of an IBS station is five simultaneous listeners, or 43,800 aggregate tuning hours per year. Kass

Dir. Test. at 21. Assuming that these stations had 12 performances of sound recordings per hour, they would owe no more than \$420.48 in 2006 under SoundExchange's per play rate, and would also pay the \$500 minimum fee.

RESPONSE: It follows that in 2006, the \$500 minimum fee owed by KXUL would represent almost 20% more than the amount it would owe if the per listener/per play rate of \$.0008 was applied strictly. In addition, this is again based on overstated listenership figures and the "overpaying" would be exacerbated by SoundExchange's proposed rate increases totaling 137% in the next 4 years

1195. Mr. Robedee testified that KTRU had an average of 8.6 simultaneous listeners in 2004, or 75,336 aggregate tuning hours for the entire year. Robedee Dir. Test. at 137. Assuming that KTRU had 12 performances of sound recordings for every one of those hours, KTRU would owe no more than \$723.23 in 2006 at SoundExchange's proposed per play rate.

RESPONSE: This calculation is based on average listenership which significantly overstates the number of listeners actually listening to music because (a) many listeners stay connected even when they are not actually listening to the stream (See Willer Tr. at 292); and (b) the average listenership figures for KTRU include non-music programming, including athletic events which garner by far KTRU's largest audiences (See Robedee Tr. at 138; see also Robedee WDT ¶¶ 24-25) and the performance of which is not compensable under the statutory license. Robedee Tr. at 151-152. Once again, this "overpaying" would be exacerbated by the annual rate increases proposed by SoundExchange, totaling 137% in the next 4 years

1196. Witnesses for college stations testified that a special rate for educational stations is appropriate because their mission is educational rather than commercial. Robedee Dir. Test. at 168-169; Kass WDT at 4; Willer Dir. Test. at 284-85; Papish Dir. Test. at 113.

1197. But the willing buyer/willing seller standard applies to all webcasters — including collegiate stations — and there is no evidence in the record that the educational mission of a station is relevant in any way to that standard. The collegiate broadcasters did not present any evidence that their educational goals affect the rate that a willing buyer and willing seller would agree to in the marketplace. Nor did the collegiate broadcasters offer any statutory basis for allowing them to enlist the intellectual property of copyright owners at a discount to further their educational mission.

RESPONSE: There, is on the contrary, a great deal of evidence in the record that Noncommercial Educational Stations have very different economics from other noncommercial stations, which is relevant to the willing buyer/willing seller standard, such as:

- the fact that, unlike NPR stations, CBI Member Stations are not "public broadcasting entities" (as defined in 17 U.S.C. 118(g)) qualified to receive funding from the

Corporation for Public Broadcasting pursuant to the criteria set forth in 47 U.S.C. § 396. Robedee WDT, footnote 5 at p.4;

- the fact that most Noncommercial Educational Stations are provided only very limited funding through student activity fees or the budgets afforded to academic departments. Robedee WDT ¶ 42;
 - the fact that the average budget of a noncommercial educational station is \$9,000. Robedee WDT ¶ 42 and Robedee Tr. at 136;
 - the fact that FCC-Licensed Noncommercial Educational Stations are, with few exceptions, prohibited from airing advertisements. Robedee WDT ¶ 46, 59
- to name only a handful of the plethora of facts submitted by Noncommercial Educational Stations.

Moreover, when the previous determination of the royalties for licenses under §§ 112 and 114 occurred, Noncommercial Educational Stations were not represented. The present proceedings are the first opportunity for a rate setting court to consider evidence submitted by Noncommercial Educational Stations as to why a rate lower than that applicable to other noncommercial stations should apply to them, as is the case under §118.

SoundExchange economic expert witness Professor Brynjolfsson has conceded that in the context of the willing buyer/willing seller dynamic, a willing seller might choose to take account of the special circumstances of Noncommercial Educational Stations and offer them special terms and an adjusted price. Brynjolfsson Reb. Test. 293-294.

Moreover, because of the abovementioned limitations on Noncommercial Educational Stations ability to absorb the cost of increased royalties by means available to commercial stations (e.g. increasing the price of advertising on their stations), the cut-off point for Noncommercial Educational Stations' willingness to buy at a given rate is inevitably much lower than for commercial stations.

1198. Even if their educational mission were relevant to the current statutory standard (which it is not), properly paying for and reporting the use of sound recordings is entirely consistent with their purported exclusively educational purpose. Mr. Kass of IBS testified that "operating a radio station offers opportunities to learn by doing." Kass WDT at 4. Part of this "learning by doing" approach can and should include the business aspects of running a business. Willer Dir. Test. at 339-40; 365-66. Mr. Kass testified that some students participating in student radio should learn these basic "business skills" as part of their education. Kass WDT at 5; Kass Dir. Test. at 50. One critical aspect of operating a webcasting business involves paying for the goods you sell and complying with regulatory requirements.

RESPONSE: None of the Noncommercial Educational Stations' witnesses suggested that these stations should be exempt from paying the royalties and nothing about the proposal from CBI would be contrary to any of the above statements.

1199. Educational stations already track data on what song is played and are equipped to provide it to SoundExchange so that their royalties can be properly attributed and distributed to the copyright owners and artists. The DMCA requires that webcasters transmit digital information about the song being played, such as the artist being played and the album. Robedee Dir. Test. at 221-23; Kass Dir. Test. at 57-58. Any station compliant with the law must enter this information automatically or manually. Robedee Dir. Test. at 222; 260-62.

RESPONSE: While educational stations do track data, anything beyond the recordkeeping as now exists would make the value of the license drop dramatically, because they go beyond the capabilities of many Noncommercial Educational Stations. Robedee Tr. at 165-166

1200. Although WHRB's Mr. Papish freely admitted that WHRB is currently not in compliance with this legal requirement, Papish Dir. Test. at 147, he acknowledged that it is technologically possible to comply. Papish Dir. Test. at 149. In fact, countless webcasting services do comply.

1201. Evidence in the record belies any claims by the collegiate broadcasters that the record-keeping requirements are too burdensome. For example, with a staff of four people, SBR Creative Media is able to handle the record-keeping and terms compliance for all of the twelve to fifteen webcasting channels plus approximately 70 to 100 holiday channels that it offers. Rahn Dir. Test. at 65-66, 106-08.

RESPONSE: SBR is a commercial enterprise which streams music already recorded on servers with the meta data needed already incorporated into the files, which is in stark contrast to the operations of the vast majority of Noncommercial Educational Stations. Robedee Tr. at 137-138, 144. This is due to the fact the SBRs services were built for webcasting in a commercial environment, whereas Noncommercial Educational Stations, most of which pre-date webcasting, were built on an entirely different model. Further, unlike SBR, most Noncommercial Educational Stations do not have employees. Robedee Tr. at 201.

1202. Educational stations have argued that it is impractical to require them to pay for their use of copyrighted music on a per-performance basis because it's too difficult for them to come up with the data that requires. Robedee Dir. Test. at 211. Paying on a per-performance basis requires providing a log of the songs that are played during a webcast and a log that shows how many people were listening at the time those songs were played. Robedee Dir. Test. at 211. However, educational station witnesses have testified that commercial radio has managed to perform this task. Willer Dir. Test. at 348.

RESPONSE: Commercial webcasters are able to do that because their systems were developed that way, with two computers connected together, so that when the song is logged in, the number of people listening at that moment and simultaneously recorded. Willer Tr. at 348. In order to do the same thing, the Noncommercial Educational Stations

would have to entirely retool their operations. Id. Because the average budget of an Educational Station is \$9,000, this would be a considerable burden, beyond the capability of many Educational Stations.

1204. Educational stations are equipped to track the songs that are played. Some educational stations have computers that automatically track which songs are played. Robedee Dir. Test. at 219-20. Other stations keep a log where they record the songs they choose to play, on paper or on a computer. Robedee Dir. Test. at 218-20; Willer Dir. Test. 341-43, 368. Mr. Willer testified that the software and hardware costs of stations complying with these reporting obligations was about \$3,000 — far less than WHRB paid for food and alcohol last year. Willer Dir. Test. at 337; Papish Dir. Test. at 154-55. In fact, educational station WHRB submitted a report to its board stating that WHRB is “certainly capable” of creating an extensive database and system to automate reporting. Papish Dir. Test. at 139-142; SX Ex. 134.

RESPONSE: The sum of \$3,000 represents no less than one third of the average budget of Noncommercial Educational Stations (\$9,000). This is a considerable burden, beyond the capability of many Noncommercial Educational Stations.

1205. Educational stations are equipped to provide SoundExchange with the required information about how many listeners receive the performances the educational stations webcast, so that their royalties can properly be attributed and distributed to the artists and owners of the copyright. Servers automatically retain logs of how many listeners are receiving these performances, and many servers are located right in the educational radio station itself. Robedee Dir. Test. at 213-214; 216-17; Willer Dir. Test. at 344.

RESPONSE: That Congress granted the § 114 statutory license to be available to webcasters of all types and sizes indicates that Congress intended to preserve the diversity of Noncommercial Educational Radio. While many stations have their servers located in the educational radio station itself, many do not and would be excluded from the diverse landscape of Noncommercial Educational Radio if the issues specific to them were not addressed. Moreover, many stations do not have the hardware or software to provide as detailed information as is requested and the cost of retooling and would be exorbitant and for many of them. As mentioned Mr. Willer testified that the software and hardware costs of stations complying with these reporting obligations was about \$3,000. Willer Tr. at 337. This represents no less than one third of the average budget of Noncommercial Educational Stations (\$9,000).

1243. SoundExchange remains ready to work with non-commercial services on ensuring that they too provide copyright owners with reasonable notice of use of sound recordings under the statutory license. Kessler WRT at 8.

1244. However, SoundExchange’s efforts to assist educational and other noncommercial webcasters in fulfilling their reporting obligations is not inconsistent with the important fact that commercial and non-commercial licensees — and not copyright

owners and performers — should bear the costs for providing reports of use. Kessler WRT at 8. The royalty recipients should not have their income reduced by having to pay the cost of monitoring transmissions made under the privilege of the statutory license. Kessler WRT at 8.

RESPONSE: None of the testimony submitted by CBI suggests that Noncommercial Educational Stations should not have to bear the cost of reporting but rather that the reporting requirements should be realistic and not be so burdensome as to threaten the very existence of some of these stations.

1488. Both the IBS and CBI proposals are also absurdly low when compared to other expenditures made by noncommercial stations. CBI's proposal — \$85 per year — is less than the \$90 annual fee for education stations that CBI charges its members. Robedee Dir. Test. at 202-203. The evidence in the record demonstrates that IBS's proposed rate is less even than the amount that WHRB, the Harvard radio station, currently pays each year for food and alcohol for its student staff. SX Ex. 135; Papish Dir. Test. 155. Mr. Kass admitted that college webcasters pay Live365 \$63.50 per month to stream their webcasts, but argues that college webcasters should pay only \$25 per year for the use of all sound recordings. Kass Reb. Test. at 59-60.

RESPONSE: CBI testified that Noncommercial Educational Stations “are primarily operated for the educational benefit of its members. They are not in there to generate money to put in anybody's pockets. It doesn't have shareholders or anything else like that.” 8/2/06Tr. 168:21-169:3 (Robedee). The average budget of a noncommercial educational station is only \$9,000 and FCC-licensed Noncommercial Educational Stations are prohibited, with few exceptions, from airing advertisements. Robedee WDT ¶¶ 42, 46, 59 and Robedee Tr. at 136. While these stations are allowed to solicit underwriting, most do not enjoy success due to their small signals and small, sometimes un-measurable audiences. *Id.* Most unlicensed Noncommercial Educational Stations also struggle to obtain ongoing advertising or underwriting of any consequence due to their limited signal and audience. CBI Member Stations' Internet simulcasts operate with fewer, and even more limited, resources. Notably, SoundExchange failed to offer any evidence to the contrary.

1490. But that provides no basis for a single flat fee to apply to all stations regardless of size, resources, or size of audience. Robedee Dir. Test. at 191. The record in these proceedings reflects that there is significant variation in the budgets of educational radio stations and in their webcasting listenership. Robedee Dir. Test. at 193-99 (testifying about variations in station budgets and accounting practices); Willer Dir. Test. at 333 (testifying that there is great variation in listeners among college radio stations for webcasting). Mr. Papish admitted that, when the Harvard Radio station needs to raise money, it has a contribution drive and can raise \$100,000. Papish Reb. Test. at 153.

RESPONSE: It is precisely because of the significant variations in the budgets of Noncommercial Educational Stations, some of which have very limited budgets that

CBI is proposing a flat fee. The costs of administering a per listener/per song fee would stretch some of these stations' resources to breaking point. Robedee WDT ¶ 69.

1492. Finally, both IBS and CBI make a series of arguments concerning the burdens of recordkeeping and claim that their fees should be reduced because they cannot keep records sufficient to comply with the statute and regulations. As the Board has made clear, recordkeeping is not part of this proceeding. In addition, the statute itself requires all services to transmit basic information about sound recordings to each listener. That some noncommercial stations violate the statute, Papish Reb. Test. at 147, does not provide a basis for reducing the rates of all noncommercial stations.

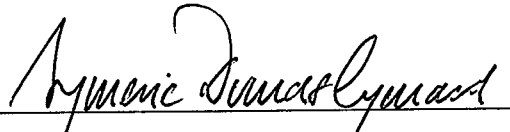
RESPONSE: The burdens of recordkeeping are highly relevant to this proceeding. The recordkeeping requirements are often cost prohibitive. Anything beyond the recordkeeping as now exists would make the value of the license drop dramatically, because they go beyond the capabilities of many Noncommercial Educational Stations. Robedee Tr. at 165-166

1493. Moreover, as discussed above, the record demonstrates that recordkeeping is both technically feasible and relatively inexpensive, especially given the statute's requirement that all webcasters must transmit the artist, sound recording, and album title to each listener. Griffin WRT at 40-42. Indeed, many colleges webcasters stream through Live365, Kass Reb. Test. at 46, 59-60. Live365 offers precisely these recordkeeping services for a modest fee. Griffin WRT at 40-42.

RESPONSE: Recordkeeping is anything but inexpensive. Mr. Willer testified that the software and hardware costs of stations complying with the recordkeeping and reporting obligations was about \$3,000. This is an excessive burden for many Noncommercial Educational Stations given their limited budgets (\$9,000 on average).

Respectfully submitted

December 15, 2006

A handwritten signature in cursive script, reading "Aymeric Dumas-Eymard", written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Reply Findings of Fact of Collegiate Broadcasters Inc. has been served this 15th day of December 2006, by electronic mail and overnight express mail, to the following persons identified on the Service List for Docket No. 2005-1 CRB DTRA:

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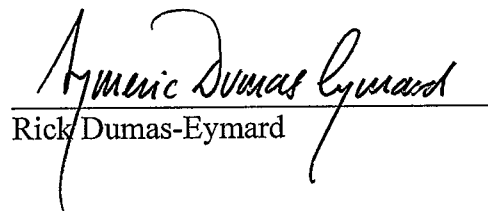
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